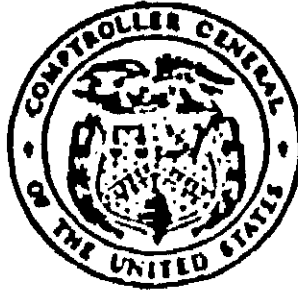


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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-203478

DATE: December 30, 1981

MATTER OF: International Trade Commission - Waiver
of Repayment of Erroneously Granted
SES Award

DIGEST:

An agency granted two Senior Executive Service (SES) bonuses on February 7, 1981, although they only had six positions in the SES at that time. One of these bonuses was erroneously granted since the Joint Resolution continuing appropriations for fiscal year 1981 (Pub. L. No. 96-536) limited SES bonuses to 25 percent of the number of SES positions in an agency. Collection of the erroneously paid SES bonus may be waived since the employee who received the bonus did so in good faith with no knowledge that it was erroneous. Collection of the erroneous bonus would be against equity and good conscience and not in the best interests of the United States.

The Chairman of the United States International Trade Commission (ITC) has requested a waiver under the provisions of 5 U.S.C. § 5584 (1976), of an overpayment made to an employee of its Senior Executive Service (SES) in the circumstances described below. Two issues have been presented by that request. First, was the payment in question an erroneous payment of compensation? Second, should the request for waiver be granted?

We conclude that the payment was an erroneous payment of compensation, and that the request for waiver of the overpayment is granted for the reasons that follow.

The ITC granted performance awards of \$5,000 each to two members of the SES on February 7, 1981. At that time the ITC had been authorized six SES positions. By letter dated April 3, 1981, the Office

of Personnel Management (OPM) informed ITC that it had exceeded the statutory limitation (25 percent) on bonuses payable in the SES by issuing two awards for six SES positions. The ITC replied to OPM by letter dated April 16, 1981, and stated that the 25 percent limitation did not apply and that, even if the limitation did apply, it was not violated because the Commission has two GS-16 Administrative Law Judge positions in addition to its six SES positions. On May 11, 1981, OPM reiterated its position that ITC had violated the statutory limitation and suggested, that instead of withdrawing one of the bonuses already awarded, ITC should approach the Comptroller General and request a waiver of indebtedness caused by the inadvertent erroneous payment.

In his letter to our Office requesting waiver, the Chairman of the ITC states that the position taken by OPM in limiting SES bonuses to one out of six SES employees is incorrect. However, based on the following analysis, we agree with OPM that ITC violated the statutory limitation.

Section 306(c) of H.R. 7593, entitled the "Legislative Branch Appropriation Act, 1981," as it passed the House of Representatives on July 21, 1980, limited the use of appropriated funds to be used for performance awards under 5 U.S.C. § 5384 in fiscal year 1981 to no more than 25 percent of the number of Senior Executive Service positions in an agency. The Joint Resolution making further continuing appropriations for fiscal year 1981 provides that all the conditions and provisions of H.R. 7593 as passed by the House of Representatives shall be effective as if enacted into law. Pub. L. No. 96-536, section 101(c), 94 Stat. 3167, December 16, 1980. Section 101(c) specifically applies sections 306(a), (b), and (d) of H.R. 7593 to any appropriation, fund, or authority made available from October 1, 1980, through June 5, 1981. Those sections provide salary pay cap limitations for executive, legislative, and judicial employees and officials. ITC believed that since section 306(c) of H.R. 7593 was not specifically cited in the Joint Resolution, it did not apply.

However, a complete reading of the Joint Resolution shows that the 25 percent limitation is applicable since section 101(c) clearly states that all the provisions and limitations of H.R. 7593 are effective as if enacted into law with two exceptions that are not applicable here. After listing the two exceptions, section 101(c) then goes on to specifically refer to the salary pay cap limitations. Thus, the statutory language is clear and the ITC erred by granting SES bonuses to two of the SES employees. The OPM is also correct in its contention that the two Administrative Law Judge positions should not be included in the computation. See 5 U.S.C. § 3132(a)(2) (1976).

The next issue is whether our Office can waive collection of one of the two bonuses granted by the ITC. The provision of law authorizing the waiver of a claim of the United States arising out of an erroneous payment of pay or allowances, 5 U.S.C. § 5584 (1976), permits waiver when the collection of the erroneous payment would be against equity and good conscience and not in the best interests of the United States and then only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other person having an interest in obtaining the waiver.

The two SES bonuses were granted on February 7, 1981, and it was not until March that OPM advised ITC that it had granted too many bonuses. Further, ITC points out that neither of the employees had any reason to know that the granting of the bonuses was illegal. Also, the bonuses were granted inadvertently by ITC based on a misinterpretation of the Joint Resolution. Therefore, we find no indication of fraud, misrepresentation, fault, or lack of good faith on the part of either of the two employees.

ITC points out that if repayment is required it would place the agency in a quandary since the choice from whom to require repayment would necessarily be arbitrary. Under these circumstances collection of

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this debt would be against equity and not in the best interests of the United States and waiver is granted pursuant to 5 U.S.C. § 5584.

Harvey D. Van Cleave
For, Comptroller General
of the United States